

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TROY TUCKER,

Plaintiffs,

v.

MERCK & CO., INC.,

Defendant.

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CIVIL ACTION

NO. 03-5015

MEMORANDUM

Giles, C.J.

June ___, 2004

I. Introduction

Troy Tucker has brought this action against Merck & Co., Inc. (“Merck”) seeking damages based on racial discrimination pursuant to 42 U.S.C. § 1981 and the Civil Rights Act of 1991.

Now before the court is Merck’s Motion for Summary Judgment pursuant to Fed. R. Civ. Proc. 56. For the reasons that follow, the motion is granted.

II. Factual Background

Consistent with the review standards applicable to a motion for summary judgment under Fed. R. Civ. Proc. 56(c), the alleged facts, viewed in the light most favorable to the plaintiff, follow.

Mr. Tucker is an employee of Merck, and has been so since September 1989. (Am. Compl. ¶ 5.) During his tenure at Merck he has been promoted several times. (Def’s Am. Mem. of Law in Supp. of Summ. Jud. at 3.) He is currently employed as a Contract Analyst in defendant’s United States Human Health division. (Am. Compl. ¶ 5.) Plaintiff asserts that since

May 2002, he has been experiencing racial discrimination at Merck. In support of his claims of racial discrimination and hostile work environment, plaintiff details numerous incidents.

Educational Assistance for Computer Networking Courses

Merck provides an Educational Assistance Program for all of its regular, full time and part time, active employees “(1) to provide support for the development of skills and knowledge that will be of direct benefit to the Company’s business results and excellence; and (2) to encourage employees to further their self development for their current assignments, expanded job responsibilities, and/or help them prepare for new assignments” (Def’s Ex. 2 at D0068a, “Manager’s Policy D1”.) The policy expressly contemplates that employees will undertake such education “while carrying on their regular work.” (Id.)

In addition, “[e]ligibility for educational assistance is contingent upon prior management approval and is not guaranteed, but is at the discretion of management upon consideration of several factors including, but not limited to, the following: the needs of the business; the applicant’s sustained, favorable annual performance; . . . [and t]he nature of the program, i.e. its relationship to the employee’s performance in his/her present job or in an area for which his/her management feels he/she has reasonable potential.” (Id.) Merck has different requirements for Educational Assistance depending upon whether the employee seeks non-degree courses, undergraduate or graduate degree work, or other special programs. (Id. at D0068b-c.) When an employee desires to take only non-degree courses, Merck requires that the courses be directly related to the employee’s job. (Id.; Def.’s Ex. 3 at P0416.) Merck grants assistance for undergraduate and graduate programs if the program is either specifically related to the employee’s current job or to “future positions at Merck for which management feels he/she has

reasonable potential.” (Def.’s Ex. 2 at D0068c.)

On May 21, 2002, plaintiff submitted a request for educational assistance to attend courses at Montgomery County Community College. (Am. Compl. at ¶ 6; Def.’s Ex. 4.) The specific courses that plaintiff sought to attend were Introduction to PC Hardware, PC Repair & Troubleshooting, and PC Operating Systems. (Def.’s Ex. 4.) On the request form, in response to the question, “Are you a degree candidate,” plaintiff checked the “No” box. (Id.) Plaintiff submitted the request to his supervisor, Randall Mattison. (Pl.’s First Dep. at 32.) Mr. Mattison then submitted the request to his supervisor, Reagan Hull. (Id. at 38.) Mr. Hull denied the request on the grounds that: 1) the courses did not relate to Mr. Tucker’s current position; 2) the course did not relate to a future position for Mr. Tucker; 3) the courses did not lead to a degree program; and 4) Mr. Tucker had not indicated on his Employee Development Plan (“EDP”) that he contemplated obtaining a future position in Information Technology (“IT”). (Hull Dep. at 19-20, 34-36.)

Following the receipt of this denial, plaintiff emailed Mr. Hull directly and informed him that the courses were not individual courses, but part of a network certification program. (Def.’s Ex. 5.) The fact that the courses would result in a network certification still did not qualify them as an “Undergraduate or Graduate Degree Program” as defined by Merck’s Educational Assistance Program. (Def.’s Ex. 2 at D0068c.) Plaintiff amended his EDP to include a possible future position in IT. (Tucker Dep. at 40, 119-21.) However, for non-degree programs, Merck’s policy requires that the courses must be related to the employee’s *current* job. (Def.’s Ex. 3 at P0416.) It is undisputed that the computer courses requested by plaintiff were unrelated to his employment at that time.

Upon receiving this additional information from plaintiff, Mr. Hull reviewed his request a second time. (See Def.'s Ex. 6.) He confirmed that Merck's education policy did not provide assistance from non-degree programs unrelated to an employee's current position. (Id.) Further, Mr. Hull followed up with John Zettler, an employee in Merck's Information Services Department, regarding qualifications for positions in the IT department, to determine if plaintiff's certification program could potentially relate to future positions within Merck. (Def.'s Ex. 6; Hull Dep. at 22.) Mr. Zettler informed Mr. Hull that the department would only hire an employee at plaintiff's level who had three to five years experience in technology and that jobs related to the certification plaintiff was seeking were located in Merck's White House, New Jersey facility, not in the West Point facility. (Def.'s Ex. 6; Hull Dep. at 22-23.)¹ Mr. Hull concluded that plaintiff did not have a reasonable potential to obtain a position in Merck's Information Services Department, thus making his request for Educational Assistance unrelated to his current position and any future position at Merck. Based upon this information, he determined that he would maintain his denial of plaintiff's request. (Def.'s Ex. 6.) Mr. Hull informed his supervisor and a Human Resources representative of this decision. (Hull Dep at 25-28; Def.'s Ex. 6.) Neither advised him that they disagreed with his determination. (Hull Dep. at 25-28.)

Plaintiff points to no other employee, in circumstances similar to his, who was approved

¹ Mr. Tucker contacted various employees in defendant's IT department and confirmed that the certification would be beneficial to him if he sought an IT position in the future. (Pl.'s Mot. in Opp'n to Mot. for Summ. Jud. at 3-4.) However, even if the program certification would have benefitted him as a candidate, Mr. Tucker has not presented evidence that any employee would be likely to receive such a position, considering the experience and credentials that he possesses.

for educational assistance for a computer certification program.

Alternative Work Agreement

Shortly after Merck denied plaintiff's request for the computer courses, plaintiff submitted a request for educational assistance to attend Saint Joseph's University's Pharmaceutical MBA Program. (Def.'s Ex. 8.) On August 26, 2002, this request was approved by plaintiff's director, Harry Rieck. (Am. Compl. at ¶ 8.) The program consisted of courses that were held on Fridays, Saturdays, and Sundays. (Pl.'s First Dep. 138-40.) The Friday courses were held during plaintiff's regular work hours. (Id.)

Employees are generally not permitted to miss work to attend courses, except with respect to certain approved programs under the Educational Assistance Program. (Lisa Miller Dep. at 37.) Because plaintiff's program would require plaintiff to miss days from work, before approving plaintiff's request, Mr. Rieck consulted with Lisa Miller, a Human Resources Business Partner, for general advice regarding employees missing work for programs. (Miller Dep. at 10; Rieck Dep. at 12-13.) Ms. Miller did not know to whom Mr. Rieck was referring, but informed him that he had discretion with regard to the request. (Miller Dep. at 33-34, 36, 38.) She suggested that if he granted time off to the employee for this purpose, it would be a good idea to have the employee sign a document reflecting the supervisor's expectation that the courses would not affect the employee's job performance. (Id. at 34-35, 38.) To that effect, Ms. Miller prepared a document entitled "Alternative Work Arrangement." (Def.'s Ex. 11.) The document stated:

Your request to take xyz class during business hours one Friday per month beginning ____ and terminating on ____ has been approved conditionally. The following set forth the terms that are expected to govern during this period.

1. It is anticipated that this arrangement will conclude no later than _____. During this time, you have agreed to make up the hours missed by _____.
2. You will be required to meet the expectations of your role and maintain acceptable performance during this period of time.

If your performance does not continue to meet expectations during this time, management may end the arrangement. Nothing in this agreement is a guarantee of employment and your employment with the Company is “at will,” and this may be terminated by either party at any time for any reason.

Please sign below to indicate your agreement with the terms of this arrangement.

(Id.) At the time she prepared the document, Ms. Miller still did not know which employee would use it; indeed, she meant for it to be used as a template when any employee was approved to take an educational course that would cause the employee to miss time from work. (Miller Dep. at 36.)

Mr. Mattison, plaintiff’s direct supervisor at the time, presented the Alternative Work Arrangement document to plaintiff for his signature. (Am. Compl. ¶ 9; Def.’s Ex. 11.) Plaintiff alleges that the request for his signature was discriminatory in that white employees receiving educational assistance were not required to sign a like document. (Am. Compl. ¶ 10.) Plaintiff refused to sign the document. (Pl.’s First Dep. at 156.) After consulting with Merck’s Legal Department, management did not require Mr. Tucker to sign the document. (Miller Dep. at 45-48.) Even without his signature, plaintiff continued to receive educational assistance to attend the Saint Joseph’s University’s Pharmaceutical MBA Program. (Pl.’s First Dep. at 116-17, 156.) While plaintiff alleges that no white employees were required to sign the Alternative Work Arrangement document, one such employee that signed the agreement, shortly after plaintiff refused, was Mary Baker, a Caucasian female. (Def.’s Ex. 13.) Plaintiff alleges that Ms. Baker was only required to sign the document “[i]n an effort to attempt to demonstrate that the AWA as

not specifically directed at Mr. Tucker or otherwise discriminatory . . .” (Pl.’s Mot. in Opp’n to Mot. for Summ. Jud. at 5-6.) Plaintiff provides no evidence to support this allegation.

The only other Merck employee that plaintiff knows participated in the MBA program and did not sign the Alternative Work Arrangement document is Jackie Lombardo. (Pl.’s First Dep. at 191-92.) However, Ms. Lombardo does not work in plaintiff’s department, and is also a member of a protected group as she is Hispanic. (Def.’s Ex. 14.)

Finally, the language of the document cannot be said to have added any condition of employment to those expected of employees responsible to account for the time away from the work for which they expected to be paid.

Educational Assistance for Simultaneous Degree Programs

In summer of 2003, while plaintiff was still receiving educational assistance for his Pharmaceutical MBA Program, he requested educational assistance to obtain a nursing degree (a “BSN”). (Pl.’s Mot. in Opp’n to Mot. for Summ. Jud. at 4.) Both plaintiff’s direct supervisor, Tim Lynch, and his director, Mr. Rieck, approved the program, but informed plaintiff that he could receive educational assistance for only one of the two programs. (Pl.’s Second Dep. at 367.) Plaintiff testified that he had not planned to attend both programs at once; rather he stated that he “was going to put the MBA on hold in order to fulfill the BSN program fully. And, then, hopefully . . . I would continue and finish the MBA.” (*Id.* at 370.) Despite his intention, plaintiff claims it was discriminatory that he was not permitted to receive payment for both programs simultaneously. (Pl.’s Mot. in Opp’n to Mot. for Summ. Jud. at 4.)

Merck’s Educational Policy does not address the issue of receiving assistance for two programs at one time. (Def.’s Ex. 2.) Mr. Rieck testified that he required plaintiff to choose one

program because he did not believe plaintiff could successfully devote time to two degree programs and the requirements of his full-time position. (Rieck Dep. at 61-63.) Merck's Educational Assistance Policy states that the decision of whether or not to provide payment is "contingent upon prior management approval and is not guaranteed, but is at the discretion of management . . ." (Def.'s Ex. 2 at D0068a.) Plaintiff claims that, "[Mr.] Rieck had no objective evidence to support his paternalistic belief that Mr. Tucker was incapable of successfully handling all three activities." (Pl.'s Mot. in Opp'n to Mot. for Summ. Jud. at 5.) However, plaintiff does not explain how this denial was discriminatory, nor does he present any other individual who was treated more favorably and permitted to receive assistance for two educational programs simultaneously.

Short Term Disability

On September 17, 2002, Mr. Tucker went out on short-term disability. (Am. Compl. ¶ 11.) Maria Becker, RN, an employee of Merck's Health Services Department, was assigned as plaintiff's case manager. (Pl.'s First Dep. at 163.) As a case manager, Ms. Becker was responsible for providing medical forms to employees, contacting employees regarding their status, contacting an employee's physician if necessary, and contacting management or human resources regarding return to work dates or work restrictions. (Becker Dep. at 20-21.)

On October 4, 2002, Mr. Tucker's physician, Dr. Clarence Martin, provided defendant's health care department with a diagnosis within the requisite fifteen day period. (Am. Compl. ¶ 12; Def.'s Ex. 16.) Around this time, Ms. Becker called plaintiff for the first time to discuss the forms. (Pl.'s First Dep. at 164-65.)

On October 21, 2002, based upon a request from Merck, Dr. Martin submitted a release

form and physician's statement regarding plaintiff's medical condition. (Pl.'s Mem. in Opp'n to Mot. for Summ. Jud. at 6; Def.'s Ex. 18.) That same day, plaintiff sent a memorandum to Ms. Becker stating that he had not received short term disability absence forms and that he needed them sent to his home. (Def.'s Ex. 19.) Ms. Becker called plaintiff at home on October 22, 2002. (Am. Compl. ¶ 13.) At the time of this call, Ms. Becker had not met plaintiff and did not know that he was African-American. (Becker Dep. at 32, 54-55.) Mr. Tucker alleges that during this call Ms. Becker harassed him and his wife. (Am. Compl. ¶ 13.) Ms. Becker called plaintiff to address his memorandum and to inform him that his medical information had been reviewed and that he had not been approved for short-term disability due to deficiencies in the documentation from his doctor. (Becker Dep. at 35; Pl.'s First Dep. at 182-84.) The phone call was ended when plaintiff's wife interceded and told Ms. Becker, "get the hell off my phone" and hung up on her. (Pl.'s First Dep. at 186.)

Following the October 22, 2002 phone call, in accordance with plaintiff's request that Ms. Becker correspond with him only in writing, Ms. Becker contacted plaintiff only once more, and did so via facsimile to inform him that his new case manager would be Linda Mastropaolo. (Pl.'s First Dep. at 174.)

On October 25, 2002, Mr. Tucker received a letter from Mr. Rieck that threatened his continued employment unless he provided evidence of his short-term disability status. (Am. Compl. ¶ 14.) Mr. Rieck sent the letter because Health Services had informed him that plaintiff had not provided sufficient documentation to support his continued absence on short term disability. (Def.'s Ex. 20.) A letter was sent at this time because plaintiff's benefits plan established a paperwork deadline of October 25, 2002. (Miller Dep. at 54-56.) The letter he sent

to plaintiff stated:

While your particular medical condition is totally confidential among you, your physician and Health Services, I have been made aware that you and your physician have been asked to provide documentation to support your continued absence on multiple occasions. I have recently been informed by our Health Services physician that both you and our physician have been notified that you failed to submit satisfactory documentation.

Please be advised that, unless such documentation is received by the Heath Services physician by close of business on Friday, October 25, 2002, you will be expected to report to work on Monday, October 28, 2002. Should you neglect to submit the satisfactory medical documentation or fail to return to work, you will be processed as a terminated employee. . . .

(Def.'s Ex. 20.) Following receipt of the letter, plaintiff contacted Ms. Becker and Mr. Rieck for an explanation for sending the letter. (Pl.'s First Dep. at 168-69.) Mr. Rieck reiterated the content of the letter, and stated that an employee's failure to submit documentation of short term disability is abandonment of the employee's job. (Id.) Ms. Becker told plaintiff that she had no knowledge of the letter, but that Ms. Miller was the correct person to contact regarding his short term disability status. (Id. at 170.) Plaintiff contacted his doctor and his therapist, who provided the appropriate medical documentation to Merck that same day. (Id. at 169-70.) This documentation was accepted by Merck. (Id. at 171-72.) Plaintiff then contacted Ms. Miller to inform her that he was still on short term disability and that he would not be coming to work on Monday, October 28, 2002. (Id.)

During the entirety of the time he was on short term disability, from September 17 or 18, 2002 through February 3, 2003, plaintiff was never denied short term disability benefits. (Pl.'s First Dep. at 172-73.) At one point, plaintiff's disability benefits were interrupted; however, this clerical error was corrected and plaintiff received full payment. (Id. at 181-82.) Plaintiff does not argue that the interruption was the result of discrimination. (Id.) Further, plaintiff does not

present any non-African American employee who received treatment better than he did while on short term disability leave. (Pl.'s First Dep. at 196.)

Performance Evaluations

For 2002 and 2003, Mr. Tucker received Performance Evaluations that he claims do not accurately reflect his performance. (Pl.'s Mot. in Opp'n to Mot. for Summ. Jud. at 7.)

2002 Evaluation:

In 2002, plaintiff was supervised by Randall Mattison. (Lynch Dep. at 17.) Mr. Tucker was out on short term disability leave between September 17, 2002 and February 3, 2003. (Pl.'s Mot. in Opp'n to Mot. for Summ. Jud. at 7.) In January 2003, Timothy Lynch assumed responsibility for managing employees who had previously been managed by Randall Mattison and Richard Nice. (Id.) Mr. Lynch was able to speak to Mr. Nice about the employees he had managed in November 2002 and February 2003. (Lynch Dep. at 24.) However, Mr. Lynch believed that he was not able to speak with Mr. Mattison because at the time he was involved in litigation against Merck. (Id. at 24-25, 63.) Mr. Lynch met with his supervisor, Mr. Rieck, to ascertain how to evaluate Mr. Tucker under these circumstances.² (Id. at 63.) Based on their discussion, Mr. Lynch tried to capture as closely as possible Mr. Mattison's mid-year review of Mr. Tucker and used the feedback forms. (Id. at 63, 67.) Mr. Mattison's mid-year review was dated August 23, 2002, only weeks before Mr. Tucker left on short term disability. (Id. at 69.) In addition, he had Mr. Tucker update his list of accomplishments. (Id. at 64.) Then, he wrote a summary of all the information he had accumulated. (Id. at 67.)

² Mr. Rieck said that he told Mr. Lynch that he should speak to Mr. Mattison if he could, though he does not recall whether at some point he directed him *not* to contact Mr. Mattison. (Rieck Dep. at 47-48.)

Merck gives an employee ratings on a spectrum marked by the phrases, “Delivered Significantly Below Objective,” “Delivered on Objective,” and “Delivered Significantly Above Objective.” (Def.’s Ex. 23.) In plaintiff’s 2002 Evaluation, in each of the five categories of performance assessed that year, plaintiff received a rating in the range of “Delivered on Objective.” (Id.) For his evaluated performance, he received a raise of \$5,650, a \$2,088 cash bonus, and a stock option to purchase 175 shares of Merck stock. (Def.’s Ex. 24.)

Mr. Tucker was rated in the lower half of those Mr. Lynch supervised for his 2002 evaluation. (Lynch Dep. at 61-62.) Plaintiff prepared a response to his 2002 evaluation (Pl.’s Ex. 7), and alleges that Mr. Lynch never responded to it. (Pl.’s Mot. in Opp’n to Mot. for Summ. Jud. at 8.) However, Mr. Lynch avers that he and Mr. Tucker had a number of performance related conversations. (Lynch Dep. at 67-68.) Plaintiff fails to present evidence that an employee in a non-protected class, similarly situated, was treated more favorably.

2003 Evaluation:

Mr. Lynch also evaluated Mr. Tucker based upon his 2003 performance. (Def.’s Ex. 37.) Plaintiff alleges that this evaluation was not accurate, and that this inaccuracy was due to racial discrimination. Plaintiff received the lowest score of any analyst rated by Mr. Lynch. (Lynch Dep. at 26.) Despite his ranking, plaintiff received a \$5,762 salary increase and a \$1,356 cash bonus. (Def.’s Ex. 25.)

Plaintiff claims that such an evaluation was unjustified, that is, it was lower than he thinks he deserved. He argues that Mr. Lynch “ignored the many positive comments made . . . in his July 2003 Stakeholder Feedback document.” (Pl.’s Mot. in Opp’n to Mot. for Summ. Jud. at 8.) Mr. Lynch testified that this Feedback was a component of Mr. Tucker’s 2003 evaluation.

(Lynch Dep. at 74.) Mr. Tucker does not claim that the Stakeholder Feedback should be determinative of his performance rating. Plaintiff's evaluation was marked "Delivered on Objective" for some traits and between "Delivered on Objective" and "Delivered Significantly Below Objective" for others. (Def.'s Ex. 37.) To support this rating, Mr. Lynch provided commentary and examples. (Id.) The evaluation states that plaintiff had poor work habits including that he: was late to work, fell asleep in work, was reading a school textbook during work hours, failed to provide sufficient assistance to his mentee, that he applied "the minimum effort to get by" to tasks, and that he "did not take responsibility for his own actions."³ (Id.) Further, the evaluation details several incidents where plaintiff performed deficiently, including, entering analyses that contained significant logic and formula errors, demonstrating initiative, and allowing pricing terms to lapse. (Id.)

Plaintiff alleges that the documents Mr. Lynch relied upon for these assessments do not support his conclusions, though plaintiff admitted that he did make errors. (Lynch Dep. at 82.) To rebut the evaluation plaintiff claims that other analysts also made errors. (Pl.'s Mot. in Opp'n to Mot. for Summ. Jud. at 8.) He alleges that Mr. Lynch chose to magnify the errors made by him. (Id.) However, plaintiff does not provide evidence of errors made by other Merck employees to support this contention. Nor does he provide any evidence which might tend to

³ While Mr. Tucker's performance evaluation did not specifically cite his attendance record, the record presented shows that he missed a great number of days during the year. (Def.'s Ex. B.) Of the forty-eight weeks he was on the job, he only worked a complete week during eighteen of those. (Id.) While his absences were excused by sick days, personal days, vacation, and holidays, the amount of time missed would have affected performance because he was often unavailable to perform. (Id.)

prove that the response was magnified as to him.⁴ Finally, he does not present any similarly situated individual who was treated more favorably.

Investigation of Mr. Tucker's Complaints

Mr. Tucker also lists several other events that allegedly support his claims. He states that he was denied the right to speak with upper management regarding his concerns. (Am. Compl. ¶ 18.) On December 2, 2002, while out on short term disability leave, plaintiff sent a memorandum to Raymond Gilmartin, Chief Executive Officer, Margie McGlynn, Executive Vice President of Customer Marketing and Sales, and Wendy Yarno, Senior Vice President of Human Resources. (Def.'s Ex. 26.) In his memorandum plaintiff made a series of allegations similar to those now alleged in this lawsuit, including that the series of events had created a hostile work environment and that individuals and departments were conspiring against him. (Id.) Michael Cavalier, Senior Director of Human Resources, responded in a letter dated January 6, 2003, informing plaintiff that the December letter had been referred to him and that he would look into the allegations. (Def.'s Ex. 27.)

On February 3, 2002, the day plaintiff returned to work from his short term disability leave, he sent out an email to numerous individuals, including: Mr. Cavalier; Rich Patrylak, Vice President of Managed Care Customer Sales & Marketing; Ms. McGlynn; Timothy Lynch, plaintiff's supervisor; Lisa Miller, Human Resources Business Partner; Mr. Rieck; Janice

⁴ Mr. Tucker alleges that Mr. Lynch treated him differently from his co-workers. (Pl.'s Mem. in Opp'n to Mot. for Summ. Jud. at 8.) To support this allegation, he alleges that Mr. Lynch maintained a book of notes from meetings with Mr. Tucker but did not do so for his meetings with his co-workers. (Id.) At this point in time, plaintiff had already filed his December 2002 letter, accusing Merck of racial discrimination and a hostile work environment. (Def.'s Ex. 26.) Plaintiff does not claim that any of his co-workers supervised by Mr. Lynch were in a similar circumstance.

Gorczyca, plaintiff's secretary; Mr. Gilmartin, Marcia Avedon, who had replaced Ms. Yarno as Senior Vice President of Human Resources; and Susan Beebe, another manager in plaintiff's department. (Def.'s Ex. 28.) The email informed these individuals that plaintiff had returned from leave and stated that he wanted to set-up individual meetings with Mr. Cavalier, Mr. Patrylak and Ms. McGlynn to follow upon his December 2002 letter. (Id.) On February 5, 2003, Mr. Cavalier responded by letter, stating again that he was Merck's contact person with respect to the complaints made in the December 2002 letter. (Def.'s Ex. 29.) He stated, "with the exception of matters that are appropriate for referral to Merck's Office of Ethics or ombudsman, your written, e-mail or telephone communications with the Company about these concerns should be directed only to me rather than to other managers and officials." (Id.) Plaintiff alleges that this direction was counter to Merck's Open Door Policy, which encourages employees to raise their concerns with management. (Pl.'s Mot. in Opp'n to Mot. for Summ. Jud. at 10.) The Open Door Policy states that concerns can be raised with upper management, but does not state or require that these issues will be dealt with directly by upper management. (Pl.'s Ex. 12, "Open Door Policy.") Here, the company appointed a Senior Director of Human Resources to investigate plaintiff's complaints.

Despite the instruction to direct correspondence to Mr. Cavalier, plaintiff sent an email to Mr. Rieck on February 7, 2003, on which he copied all of the executive level managers that he previously had included on the emails, summarizing a meeting that had taken place between himself and Mr. Rieck on February 6, 2003. (Def.'s Ex. 30.) Specifically addressing Mr. Patrylak, Ms. McGlynn, and Mr. Cavalier, he wrote, "Rich, Margie, & Mike – I will schedule meetings with you through your Administrative Assistants." (Id.) Then addressing Mr.

Gilmartin and Ms. McGlynn, he wrote, “Ray & Margie – As CEO and President of Merck & Co., Inc., you are obligated to intervene and to ensure that an unbiased and objective investigation is conducted because you are officers of the company.” (Id.) Shortly after, plaintiff sent email messages to Mr. Cavalier’s, Mr. Patrylak’s, and Ms. McGlynn’s assistants requesting meetings with each of them during a specified three day period. (Pl.’s First Dep. at 294-98.) Finally, plaintiff sent an email to Mr. Patrylak stating, “I was informed by Harry Rieck . . . that you refused to meet with me to discuss my experiences (discrimination, hostile work environment, retaliation, and conspiracy) within CCM. This means to me that you are condoning the past and future behaviors of the individuals within your dep[artmen]t.” (Def.’s Ex. 31.) Mr. Cavalier, who was copied on plaintiff’s emails, sent a third letter to plaintiff directing him to stop harassing senior managers and officials with emails and telephone calls, and threatening disciplinary action if the harassment did not stop. (Def.’s Ex. 32.) He further explained that because he or the Ombuds office were the designated contacts for plaintiff on these issues other managers would not respond and that their silence should not be construed as agreement with the plaintiff’s assertions and conclusions. (Id.)

Plaintiff alleges that the investigation conducted by Mr. Cavalier was inadequate. (Pl.’s Mem. in Opp’n to Mot. for Summ. Jud. at 10.) Plaintiff bases this opinion on the number of interviews that Mr. Cavalier conducted, as well as that several individuals that plaintiff accused of discrimination were not given in-person interviews. (Id.)

Plaintiff does not present any individual who, under circumstances similar to his, received more favorable treatment, or a more thorough investigation.

Personal Days

Plaintiff claims that he has been denied his rights as an employee under the Merck Absence from Work policy. (Am. Compl. ¶ 18.) Mr. Tucker claims that this policy has been strictly enforced against him, while they have been relaxed for similarly situated white employees. (Am. Compl. ¶ 19.) Mr. Tucker also claims that Merck employees enforced non-existent policies against him, to his detriment. (Id.)

Under Merck's Merck's Manager's Policy B1–Absence from Work provides:

Absences for Personal Matters for which the employee normally may be paid include . . . Legal or civil obligations, if unable to be arranged during non-working times, (e.g., closing on a house, jury duty, etc.) and when not involving infractions of laws by the employee.

(Def.'s Ex. 33 at D0002.) It is left to manager's discretion whether to grant an employee's request for personal leave and whether any personal leave will be with or without pay. (Id.; Kristen Green Dep. at 12.) Even if employees receive pay, they do not lose vacation time when they are granted personal days. (Pl.'s Second Dep. at 315-16.) Because personal days function in this manner, Merck managers are advised to limit the number of personal days granted to employees. (Green Dep. at 12-13.)

Mr. Lynch, plaintiff's supervisor, testified that, as a general matter, he did not require his subordinates to provide a reason for requesting personal leave and only when a subordinate has accumulated seven personal days did he check an individual's total before granting leave. (Lynch Dep. at 39.) Of the first four weeks, or nineteen days,⁵ of work after Mr. Tucker returned from medical leave, he was absent nine and a half days. (Def.'s Ex. B at D0611.) All of

⁵ This excludes one working day that was a snow day. (Def.'s Ex. B at D0611.)

plaintiff's absences were excused by vacation days, or personal days that plaintiff alleges were for valid reasons, such as medical appointments and attendance at depositions related to this lawsuit. (Id.; Pl.'s Mot. in Opp'n to Mot. for Summ. Jud. at 11.) Five of these absences were personal days. (Def.'s Ex. B at D0611.) On average, employees use four or five personal days each year. (Green Dep. at 13.) During the same period of time, of the six other employees in plaintiff's department, five took no personal time, and one person took half of a day. (Def.'s Ex. B at D0611.) In this period, Mr. Lynch began monitoring plaintiff's usage of personal leave and requested that he provide a reason for his personal leave requests. (Lynch Dep. at 60-61.)

Plaintiff had requested paid personal leave for his deposition and attendance at the depositions of other witnesses involved in this action as well as his prior action against Merck, Civil Action Number 02-2421. (Pl.'s Second Dep. at 316; Green Dep. at 26-28.) However, Merck granted his request to use paid personal days to attend his own deposition. (Pl.'s Second Dep. at 317-18.) Merck denied plaintiff's request to use personal days to observe the depositions of other witnesses, though plaintiff was informed that he could use his vacation days if he wished. (Id. at 317.)

Plaintiff continued to take more personal days than his co-workers. (Def.'s Ex. B at D0617.) By the end of August, he had taken 16.5 personal days, while the average number of days taken by other people in plaintiff's department was 1.3 days.⁶ Sometime between August 27, 2003 and October 23, 2003, Mr. Tucker was informed that he would not be granted any more

⁶ Plaintiff's co-workers that were in the department continuously from February 1, 2003 to August 31, 2003 include: Glenn Borgmann, Tim Lynch, Bret Orpin, Sharon Podulka, and Kirt Willis. (Def.'s Ex. B at D0611-17.) During this time these individuals utilized 0, 1, 2, 1 ½, and 2 personal days, respectively. (Id.)

paid personal days in 2003 for any reason. (Pl.’s Mot. in Opp’n to Mot. for Summ. Jud. at 11-12.) Plaintiff avers that there were several individuals similarly situated who were not subject to the same treatment. (Id. at 12.) However, the record shows that the individual with the greatest number of personal days after plaintiff was Jef Rayburn, who took 8.5 days, which is still one-half the number of days plaintiff took. (Def.’s Reply Mem. at 5 n.2.) Plaintiff cannot point to any other employee who took as many personal days as he received, or any individual who was granted paid personal days to attend depositions of witnesses to their lawsuits.

Alleged Attempt to Terminate

In November 2002, after being informed that plaintiff was attending school on disability leave, plaintiff’s new case manager, Linda Mastropaolo, contacted plaintiff’s therapist. (Mastropaolo Dep. at 17-19; Am. Compl. ¶ 15.) She asked about plaintiff’s ability to return to work, as well as whether the fact that plaintiff was attending classes was consistent with his being on short term disability leave. (Mastropaolo Dep. at 17-19; Am. Compl. ¶ 15.) Plaintiff alleges that this was an attempt by Merck to seek a reason to terminate him. (Pl.’s Mot. in Opp’n to Mot. for Summ. Jud. at 12.) Plaintiff admits that Ms. Mastropaolo never harassed him and was always pleasant when she spoke with him. (Pl.’s First Dep. at 188.)

III. Discussion

A. Summary Judgment Standard

Under Fed. R. Civ. P. 56(c), summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a summary judgment as a matter of law.” Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Fed.

R. Civ. P. 56(c). In order to avoid summary judgment, disputes must be both 1) material, meaning concerning facts that are relevant and necessary and that might affect the outcome of the action under governing law, and 2) genuine, meaning the evidence must be such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Although the defendant bears the initial burden of asserting the basis for its motion, the defendant is not required to negate the plaintiff's claim. A defendant must only point out that there is an absence of evidence which demonstrates that the plaintiff can prove his or her case. Lawrence v. Nat'l Westminster Bank New Jersey, 98 F.3d 61, 69 (3d Cir. 1996). Therefore, to survive a motion for summary judgment, the non-moving party must come forward with admissible and credible evidence supporting each element essential to that party's case; mere conclusory allegations or denials are not sufficient. Schoch v. First Fidelity Bancorporation, 912 F.2d 654, 657 (3d Cir. 1990).

B. Section 1981

Section 1981, which prohibits racial discrimination in the making and enforcement of property transactions provides that:

All persons within the jurisdiction of the United States shall have the same rights in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981(a), as amended by the Civil Rights Act of 1991. Claims alleged under § 1981 are analyzed under the same framework as those raised under Title VII. See Pamintuan v. Nanticoke Mem. Hosp., 192 F.3d 378, 385 (3d Cir. 1999) (same standard for § 1981 as Title VII

for discrimination claim).

C. Race Discrimination under Section 1981

Here, there is no direct evidence of discrimination alleged. Claims alleging disparate treatment, whether § 1981 or Title VII, must be analyzed under the burden shifting framework articulated by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and later crystallized in Texas Dep't. of Comty. Affairs v. Burdine, 450 U.S. 248 (1981). Under these cases, a plaintiff initially must establish the elements of a prima facie case of discrimination. McDonnell Douglas, 411 U.S. at 802. If that is successfully done, the burden shifts to defendant to produce a legitimate, non-discriminatory reason for its action. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000); Texas Dep't of Comty. Affairs, 450 U.S. at 253-54. The defendant bears the burden of production, not of persuasion, at the summary judgment stage. Reeves, 530 U.S. at 143. Once the defendant produces a legitimate, non-discriminatory reason for the challenged employment decision, the plaintiff must show that the proffered reason is “unworthy of credence” and that race was the real motivation for defendant’s actions. Id.; Texas Dep't of Comty. Affairs, 450 U.S. at 256; McDonnell Douglas Corp., 411 U.S. at 802.

Under § 1981, a prima facie case for disparate treatment requires plaintiff to demonstrate that he or she: (1) is a member of a protected class; (2) was qualified for a position; (3) suffered an adverse employment action; and (4) nonmembers of the protected class were treated more favorably. See Ezold v. Wolf, Block, Schorr and Solis-Cohen, 983 F.2d 509, 522 (3d Cir. 1992); Velez v. QVC, Inc., 227 F. Supp. 2d 384, 407 (E.D. Pa. 2002). An adverse employment action has been defined as one that causes a “significant change in employment status, such as hiring,

firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits.” Burlington Indus. Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

Because the plaintiff bears the ultimate burden of persuasion in a disparate treatment case, a defendant is entitled to summary judgment of it can demonstrate that the plaintiff could not carry the burden of proof at trial. Where no direct evidence of discrimination exists, a defendant may demonstrate this in two ways: (1) it may show that the plaintiff is unable to establish a prima facie case of discrimination; or (2) if the plaintiff has successfully established a prima facie case, by showing that the plaintiff could not produce sufficient evidence of pretext to rebut an assertion of non-discriminatory reasons for the employment decision. Jalil v. Avdel Corp., 873 F.2d 701, 707 (3d Cir. 1989); see also Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994).

As an African-American, plaintiff satisfies the first prong requiring that he be a member of a protected class. (Am. Compl. ¶ 3.) With regard to the second prong, it is not disputed that he was qualified to perform his job position. However, the plaintiff fails to satisfy the third prong in that he does not demonstrate that he suffered any adverse employment action. Further, even assuming *arguendo* that an adverse action did occur, he fails to demonstrate that other individuals, not in the protected class, were treated more favorably.

Indeed, plaintiff concedes that he has not suffered an adverse employment action regarding each of the alleged events, excepting only his performance evaluations. Accordingly, with regard to seven of his eight allegations, he admits that he was unable to establish a prima facie case of intentional discrimination under § 1981.

The court notes that even assuming *arguendo* that plaintiff had established an adverse employment action with regard to these seven claims, he failed to demonstrate that there were similarly situated members of a non-protected class that were treated better than he. Only in two of the seven instances does plaintiff even allege that there were such individuals: with regard to the Alternative Work Agreement (“AWA”), and concerning the use of personal days.

Plaintiff alleges that Jackie Lombardo, who also participated in the same MBA program as plaintiff, was not required to sign an Alternative Work Agreement. However, this cannot create an inference of discrimination as a matter of law. First, plaintiff was not required to sign the AWA. When he refused to do so, the department did not force him, and he continued to attend classes and to receive educational assistance. Thus, he and Ms. Lombardo were treated equally. Further, Ms. Lombardo is not white as plaintiff alleges, but is also a member of a protected class. She is Hispanic. Finally, plaintiff must concede that there was a white employee, Mary Baker, who was required to sign the AWA, refuting any inference that plaintiff was only required to sign because he was black. While plaintiff claims that Ms. Baker was required to sign only as Merck’s attempt to not appear to have been discriminating against him, the fact is that she signed the AWA and is a proper comparator in the required disparate treatment analysis.

With regard to his personal days, plaintiff fails to present any individuals who were similarly situated. Plaintiff does present seven other individuals who used more than five personal days in 2003. (Pl.’s Mot. in Opp’n to Mot. for Summ. Jud. at 12.) However, in 2003, plaintiff used seventeen personal days. He did not begin to be monitored for his usage of personal days until he had used five in the *first month* after he returned from medical leave.

Among the individuals who plaintiff alleges are similarly situated, the highest number of personal days taken was by Jef Reyburn, who used eight and half days. This is still half of what plaintiff used over the year and, thus, cannot be considered similarly situated.

Performance Evaluations

Plaintiff contends that his performance evaluations for 2002 and 2003 did not reflect his performance, and that his inaccuracy was due to racial discrimination. As a result, plaintiff contends that he suffered a financial harm in that he did not receive salary bonuses and increases that were as high as they would have been with an accurate evaluation.

For each year in question plaintiff received a salary increase of more than \$5,000. In 2002 he received a bonus of \$2,088, and in 2003 for \$1,356. Mr. Tucker does not allege that these increases were below what he had received prior to 2002, nor does he allege that they were below the Merck average. Without such evidence, plaintiff has failed to prove by a preponderance of the evidence that the salary increases and bonuses are not on par with the company average. Further, it is unclear how these incentives are tied to the evaluations. If plaintiff's evaluation improved, it is unclear whether he would automatically have received more benefits. Accordingly, plaintiff has failed to meet his burden of showing that he suffered from an adverse employment action.

Even if plaintiff were able to demonstrate an adverse employment action his claim would still fail, cannot satisfy the requirement of showing that any similarly situated individuals existed or were treated more favorably. Mr. Tucker was in the bottom half of the 2002 evaluations and was the lowest ranked analyst in 2003. This fact shows that there were several white employees ranked higher. However, plaintiff fails to demonstrate that any of these individuals were

similarly situated. In order to be considered “similarly situated” for the purpose of discrimination cases, “the plaintiff must prove that all of the relevant aspects of his employment situation are nearly *identical* to those of the . . . employees whom he alleges were treated more favorably.” Miller v. Delaware, Dept. of Probation and Parole, 158 F. Supp. 2d 406, 411 (D. Del. 2001) (emphasis added) (internal citation omitted); Anderson v. Haverford College, 868 F. Supp. 741, 745 (E.D. Pa. 1994) (plaintiff must show that she and the other individual “engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish [her] conduct or the employer’s treatment of them for it.”). In order to present a similarly situated individual in this case, plaintiff would need to show that another employee performed similarly to him, or accomplished similar tasks and objectives, but received a superior evaluation. Plaintiff only alleges that there are white employees in his department who received higher evaluations. While it is possible that the rankings were the result of race, it is also possible that the performance of those employees was superior to that of Mr. Tucker. Indeed, considering that plaintiff’s evaluation contains many examples of his failings, this explanation seems logical. Regardless, without more information about the other employees, plaintiff has not met his burden of showing that they are similarly situated. Merely showing that they are in the same department does not suffice. Accordingly, plaintiff fails to make a prima facie case of racial discrimination.

D. Hostile Work Environment

The Civil Rights Act of 1991, Pub. L. No. 102-166 § 2, amended 42 U.S.C. § 1981 to provide a cause of action for racial harassment. To establish a hostile work environment claim a plaintiff must allege, under the totality of the circumstances, that (1) he suffered intentional

discrimination because of his or her membership in a protected class; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the plaintiff; (4) the discrimination would have detrimentally affected a reasonable person of the same protected class in that position; and (5) the existence of respondeat superior liability. Faragher v. City of Boca Raton, 524 U.S. 775, 787-89 (1998); Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990).

“In determining whether an environment is hostile or abusive, we must look at numerous factors, including ‘the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; whether it unreasonably interferes with an employee’s work performance.’” Weston v. Pennsylvania, 251 F.3d 420, 426 (3d Cir. 2001) (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993)). To fulfill his burden a plaintiff is required “to show that his work environment was so pervaded by racial harassment as to alter the terms and conditions of his employment.” Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 768 (1998). “[T]o constitute a hostile work environment, there must be more than a few isolated incidents of racial enmity, meaning that instead of sporadic racial slurs, there must be a steady barrage of opprobrious racial comments.” Al-Salem v. Bucks County Water & Sewer Auth., No. 97-6843, 1999 WL 167729, *5 (E.D. Pa. March 25, 1999) (quoting Schwapp v. Town of Avon, 118 F.3d 106, 110-11 (2d Cir. 1997)).

Plaintiff alleges eight separate incidents to establish that he was subjected to a racially hostile work environment. (Pl.’s Mot. in Opp’n to Summ. Jud. at 20-21.) He alleges that he experienced racial discrimination that was pervasive and regular and has occurred continually since June 2002. (Id.) He further avers that he was detrimentally affected in that he had a

heightened level of stress and anxiety, at one point forcing him to take short term disability leave. (Id. at 21.) Finally, he argues that there is a material dispute as to whether a reasonable black person in the same circumstances would have been detrimentally affected. (Id.)

A hostile work environment claim is “not intended to serve as a code of civility . . . but rather as a legal protection against a work place permeated with ‘discriminatory intimidation, ridicule, and insult,’ amounting to ‘an abusive working environment.’” Satterfield v. United Parcel Serv., Inc., No. 00-7190, 2003 WL 22251314, *7 (S.D.N.Y. Sept. 30, 2003) (citing Faragher v. Boca Raton, 524 U.S. 775, 788 (1998); quoting Mack v. Otis Elevator Co., 326 F.3d 116, 122 (2d Cir. 2003)). While few definitive rules exist to determine whether an environment reaches a threshold of hostility such as to establish liability, the Supreme Court of the United States has required that the environment be “extreme to amount to a change in the terms and conditions of employment.” Faragher, 524 U.S. at 788. Accordingly, a hostile work environment claim does not “protect a plaintiff who experiences conduct that is merely offensive or annoying.” Bishop v. Nat’l R.R. Passenger Corp., 66 F. Supp. 2d 650, 663 (E.D. Pa. 1999). Even “isolated or single incidents of harassment are insufficient to constitute a hostile work environment.” Rush v. Scott Specialty Gases, Inc., 113 F.3d 476, 482 (3d Cir. 1997).

Plaintiff fails to demonstrate that he was the victim of intentional discrimination. In his hostile work environment claim, plaintiff cannot cite a single incident involving the utterance of a racial epithet, the use of a racist symbol, or *any* direct comment concerning race. Rather, plaintiff raises eight separate instances where Merck made determinations regarding benefits issues raised by him. These incidents were each employment decisions or actions not linked directly with conduct regarding race. As discussed earlier, plaintiff failed to establish a prima

facie case of intentional discrimination for each of the decisions. He has no direct evidence of discrimination and points to no similarly situated individual treated more favorably. Plaintiff's subjective disagreement with these decisions, and even his opinion that they were racially motivated and were offensive, is insufficient as a matter of law to establish a hostile work environment. See Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (holding that the "mere utterance of an . . . epithet which engenders offensive feelings in an employee . . . does not sufficiently affect the conditions of employment" to be actionable (internal citation omitted)).

A claim of a hostile work environment is allowed to prevent "an abusive working environment," and not to substitute the courts' judgment for an employer's discretionary decisions. Because plaintiff fails to demonstrate that he suffered from intentional, pervasive, and severe discrimination, he has not established a prima facie case for a hostile work environment. Accordingly, summary judgment on this issue must also be granted.

F. Conclusion

For the foregoing reasons, defendant's Motion for Summary Judgment is granted and judgment is entered in favor of defendant. An appropriate order follows.